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### Rebranding Public Nuisance: City of Cleveland v. Ameriquest Mortgage Securities, Inc. as a Failed Response to Economic Crisis

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# REBRANDING PUBLIC NUISANCE: *CITY OF CLEVELAND V. AMERIQUEST MORTGAGE SECURITIES, INC.* AS A FAILED RESPONSE TO ECONOMIC CRISIS

Matthew Saunig<sup>+</sup>

“Despite attempts by . . . courts to rein in this creature, [nuisance], like the Hydra, has shown a remarkable resistance to such efforts. [It therefore requires] an analysis worthy of Hercules, rather than his predecessors.”<sup>1</sup>

The American home foreclosure crisis<sup>2</sup> is “a force that is undermining the social and economic vitality of . . . communities, from which it may take decades to recover.”<sup>3</sup> Mortgage debt increased by eighty percent in the United States between 2000 and 2006, creating a housing bubble that loomed too large to continue in perpetuity.<sup>4</sup> After the bubble burst between 2006 and

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1. *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 520 (Mich. Ct. App. 1993).

2. Press Release, The U.S. Conference of Mayors, Foreclosure Crisis Adds to Existing Vacant and Abandoned Property Problems in Cities (June 21, 2008) (on file with author), available at <http://usmayors.org/Pressreleases/uploads/vacantenglish.pdf> (reporting that the majority of American mayors surveyed held a negative outlook about the increasing instances of foreclosures and abandonments of residences within their cities).

3. ALAN MALLACH, METROPOLITAN POLICY PROGRAM AT BROOKINGS, ADDRESSING OHIO’S FORECLOSURE CRISIS: TAKING THE NEXT STEPS 5 (2009) (discussing the widespread effects of the foreclosure crisis in Ohio and cautioning that the various legislative and administrative measures taken to address the crisis may be insufficient to stabilize Ohio neighborhoods and reverse the foreclosure trend of recent years).

4. STAFF OF H.R. COMM. ON OVERSIGHT & GOV’T REFORM, 111TH CONG., THE ROLE OF GOVERNMENT AFFORDABLE HOUSING POLICY IN CREATING THE GLOBAL FINANCIAL CRISIS OF 2008, at 12 (Comm. Print 2009) [hereinafter STAFF OF H.R. COMM.]; cf. *Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1406 nn.1–2, 1406–07 (9th Cir. 1996) (noting the public policies underlying the creation of Freddie Mac and stating that “[t]he congressional purposes for Freddie Mac are clearly designed to serve the public interest by increasing the availability of mortgages on housing for low- and moderate-income families and by promoting nationwide access to mortgages”); John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 145, 146 (2009) (explaining that the provisions of the Fair Housing Act “may [have] increase[d] the freedom of choice for homebuyers but have not necessarily helped produce integrated neighborhoods or addressed segregated living patterns”).

2008,<sup>5</sup> cities across the country experienced rising home foreclosures.<sup>6</sup> The ensuing aftermath of these housing foreclosures has left cities scrambling to find a successful remedy for the skyrocketing costs of foreclosures that have taken a toll on urban tax bases and residents.<sup>7</sup> During this time, political pressures abound<sup>8</sup> and individual lawsuits are largely ineffective to achieve the type of results necessary to preserve economic viability in municipalities.<sup>9</sup>

In an attempt to hold a larger class of lenders responsible for its foreclosure crisis, the City of Cleveland pursued a novel course of action by asserting that twenty-one lenders constituted a public nuisance when they created mortgage-backed securities either by bundling subprime loans or by lending funds to purchase loans.<sup>10</sup> The City of Cleveland alleged that the “spike in foreclosure

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5. See FED. RESERVE BANK OF CLEVELAND, ANNUAL REPORT 2008, at 6 (2009), available at [http://www.clevelandfed.org/About\\_Us/annual\\_report/2008/2008\\_AR.pdf](http://www.clevelandfed.org/About_Us/annual_report/2008/2008_AR.pdf) (observing a sharp decline of \$4.2 trillion in American home values from late 2006 to late 2008).

6. See Press Release, The U.S. Conference of Mayors, *supra* note 2 (reporting survey results showing that seventy-one percent of responsive U.S. cities have experienced an increase in foreclosed properties); see also FED. RESERVE BANK OF CLEVELAND, *supra* note 5, at 6 (discussing that there have been over 170,000 new foreclosures in Ohio between 2006 and 2008).

7. See Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1172 (“Current legal remedies were not designed to address the level of foreclosure and abandonment some cities are now facing and pursuing certain remedies takes too long to prevent irreversible damage to the surrounding neighborhoods.”); see also DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 640 (5th ed. 2008) (noting that the foreclosure crisis has generated “serious concerns” about “renewed abandonment, overcrowding, homelessness, code violations and demolition of housing”).

For example, Philadelphia, Pennsylvania, has sought to curb foreclosures by exhausting all bargaining possibilities before allowing foreclosure proceedings to commence. Peter S. Goodman, *Philadelphia Gives Struggling Homeowners a Chance to Stay Put*, N.Y. TIMES, Nov. 18, 2009, at A1. Under the Philadelphia approach, a lender may not foreclose on an owner-occupied home until the lender and the homeowner meet “face-to-face” to try to reach a compromise. *Id.* The homeowner is given some form of counseling in these meetings, including legal representation in some instances. *Id.* These “conciliation conferences” have achieved some level of success as attempts to keep borrowers in their homes. *Id.* In fact, hundreds of borrowers have been able to reach agreements with their lenders that prevent the borrowers—and also the City—from enduring the costs of foreclosures. *Id.* Despite the immediate benefit of delaying foreclosures and keeping people in their homes until final resolution, there is still a fear among troubled Philadelphia borrowers that the program is only “postponing the inevitable.” *Id.*

8. See Christopher Maag, *Cleveland Sues 21 Lenders over Subprime Mortgages*, N.Y. TIMES, Jan. 12, 2008, at A9 (quoting the mayor of Cleveland’s remark that the lenders would be “held accountable for what they’ve done”).

9. See Johnson, *supra* note 7, at 1198 (explaining that large-scale litigation “cannot stem the tidal wave of rising foreclosures and abandonment because these proceedings involve a single lawsuit against an individual lender for a single blighted property”).

10. *City of Cleveland v. Ameriquist Mortgage Sec., Inc.*, 621 F. Supp. 2d 513, 516 (N.D. Ohio 2009). The bundling of subprime loans, or securitization, is the process of grouping similar assets as interests in a way that allows for investors to buy the interests or the securities backed by the interests. See Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 7–8 (2009). This process encouraged a relaxation of

activity” it experienced was a foreseeable result of these lending practices.<sup>11</sup> The City sought damages for costs associated with the foreclosed and abandoned properties that increasingly plagued its neighborhoods.<sup>12</sup> In denying Cleveland’s public nuisance claim, however, the United States District Court for the Northern District of Ohio declined to extend the boundaries of public nuisance to include such business practices.<sup>13</sup>

Some scholars describe nuisance law as the codification of reasonableness.<sup>14</sup> In *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*, the City of Cleveland alleged a public nuisance,<sup>15</sup> which is “an unreasonable interference with a right common to the general public.”<sup>16</sup> A court must balance a public right against the “utility of conduct”<sup>17</sup> alleged to be a nuisance in order to determine whether conduct is reasonable and achieves a result that furthers the common good.<sup>18</sup> Like any cause of action, the scope of public nuisance is not

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underwriting standards that “ran roughshod over the financial industry” and “made the entire financial system more fragile.” Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1311 (2009).

11. *Ameriquest*, 621 F. Supp. 2d at 516.

12. *Id.*

13. *Id.* at 536.

14. See George P. Smith II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 664–65 (1995) (“[I]t is within the crucible of nuisance law that the practical foundations and the tests of reasonableness and economic efficiency are realized in both their original development and contemporary application.”). Professor Smith notes that “[t]here is a symbiotic, if not an inextricable or binding, relationship” between nuisance law and economic reasonableness. *Id.* at 665. When weighing competing courses of action to determine the more reasonable of the two, courts should use an economic cost-benefit analysis that seeks to maximize wealth. *Id.* at 664. The courts—in lieu of an increasingly irrational populace—are in the best position to define economic reasonableness and wealth maximization in order to safeguard “the economic underpinnings of the capitalistic free-market economy.” *Id.* at 739.

15. *Ameriquest*, 621 F. Supp. 2d at 515.

16. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). By contrast, a private nuisance is “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.” *Id.* § 821D. Public and private nuisances may overlap when an interference with a public right could also constitute a disruption of an individual’s use or enjoyment of private land. 1 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS 95–96 (3d ed. 2006) (illustrating a potential area of overlap between public and private nuisance by discussing vibrations that simultaneously hinder the use of a highway and cause damage to a privately owned building). The primary distinctions between public and private nuisance are the number of people affected and the interest allegedly harmed by the nuisance-like activity. See *id.* at 91, 96.

17. RESTATEMENT (SECOND) OF TORTS § 828. The *Second Restatement of Torts* lists several factors used to calculate the utility of particular conduct: (1) “the social value that the law attaches to the primary purpose of the conduct”; (2) “the suitability of the conduct to the character of the locality”; and (3) “the impracticability of preventing or avoiding the invasion.” *Id.*

18. See Smith, *supra* note 14, at 663–64. The *Second Restatement of Torts* describes the appropriate analysis for balancing public interference with private utility:

[I]n determining whether the gravity of the interference with the public right outweighs the utility of the actor’s conduct, it is necessary to consider the extent and character of

boundless; certain limitations exist to shape the scope of nuisance law.<sup>19</sup>

Although a detailed economic analysis of mortgage lending is beyond the scope of this Note, it is important to present a brief, simplified version of the events that caused the foreclosure crisis because of their inextricable relationship to Cleveland's public nuisance claim.<sup>20</sup> Defaults on subprime loans are credited as one of the primary causes of the foreclosure crisis.<sup>21</sup> Subprime lending is a mechanism through which a borrower—who would normally be unable to obtain mortgages due to poor credit or low income—can obtain a mortgage for a smaller down payment.<sup>22</sup> These home loans include a

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the interference, the social value that the law attaches to it, the character of the locality involved and the burden of avoiding the harm placed upon members of the public.

RESTATEMENT (SECOND) OF TORTS § 827 cmt. a.

Professor Smith suggests that the appropriate definition of the common good is an “economic inter-generational Golden Rule” whereby “the present generation should do unto the next generation as we would (should) do unto ourselves.” Smith, *supra* note 14, at 675; *see also* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 561 (7th ed. 2007) (“[I]t is to the benefit of all interest groups that when courts are enforcing common law principles they should concentrate on trying to increase the aggregate wealth of society by making the principles and case outcomes efficient.”); *cf.* Bernhard Grossfeld & Hansjoerg Heppe, *The 2008 Bankruptcy of Literacy—A Legal Analysis of the Subprime Mortgage Fiasco*, 15 *LAW & BUS. REV. AM.* 713, 716 (2009) (arguing that the law “serves to analyze and correct the orientation of economics that cannot operate without a value system”). Regardless of the role of economics in constructing the common good, the desired resolution of a nuisance action—the achievement of the greatest good for the greatest number of people—is founded in utilitarianism. *See* John C. Duncan, Jr., *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 *COLUM. J. ENVTL. L.* 169, 216 n.216 (1999) (explaining that the common good relates to the utilitarian principle of achieving the “greatest happiness”).

19. *See* discussion *infra* Part I.B.1–2 (examining the economic loss doctrine and proximate cause limits of public nuisance that barred the City of Cleveland from succeeding on its public nuisance claim against the group of lender-defendants).

20. *See, e.g.*, Oren Bar-Grill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 *CORNELL L. REV.* 1073, 1083 (2009) (explaining that the complexity of subprime contracts hinders healthy competition within the market); Ricardo J. Caballero & Alp Simsek, *Complexity and Financial Panics* 24–25 (MIT Dep’t of Econ., Working Paper No. 09-17, 2009), available at <http://econ-www.mit.edu/files/4268> (noting the inherent complexities in the interplay between the financial market and the institutions that operate therein).

21. Johnson, *supra* note 7, at 1175. Conceptually, however, the securitization of subprime loans is generally seen as economically healthy because “[a]s long as borrowers do not default . . . risks can be reduced and everyone benefits.” FED. RESERVE BANK OF CLEVELAND, *supra* note 5, at 8.

22. *See* U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF TREASURY, *CURBING PREDATORY HOME MORTGAGE LENDING* 1, 13 (2000) [hereinafter U.S. DEP’T OF HOUS.] (examining predatory lending practices and calling for regulatory and legislative initiatives to combat that widespread practice while still providing affordable loans to low- and moderate-income borrowers); FED. RESERVE BANK OF CLEVELAND, *supra* note 5, at 8 (“[S]ubprime borrowers have blemished credit histories and pose greater repayment risks.”). Another factor contributing to the financial crisis is the rise in variable rate mortgages; such mortgages begin with manageable monthly payments that can eventually double because of high interest rates. *See, e.g.*, Goodman, *supra* note 7 (sharing the experience of Christopher Hall, a Philadelphia

caveat: they are conditioned on higher interest rates and greater up-front fees.<sup>23</sup> The rapid growth of the subprime lending market at the conclusion of the twentieth century<sup>24</sup> was largely the result of federal initiatives aimed at encouraging greater low- and moderate-income home ownership.<sup>25</sup> A decline in home prices,<sup>26</sup> coupled with rising unemployment,<sup>27</sup> left many of these borrowers incapable of making their mortgage payments and, therefore, delinquent on their loans.<sup>28</sup> In response, the lending banks were forced to foreclose on the houses.<sup>29</sup> The relatively small down payments required to obtain subprime loans provided virtually no incentive for borrowers to continue making mortgage payments to such an extreme degree that delinquency and abandonment of the properties seemed sensible.<sup>30</sup> The City of Cleveland's public nuisance claim arose out of this climate.<sup>31</sup>

This Note first provides a general overview of nuisance law, focusing on public nuisance and its various permutations and limitations. More

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resident, whose original monthly payment of \$500 on a variable rate mortgage increased to \$950 and became an unmanageable burden because he earned only \$1000 per week and supported three children).

23. See U.S. DEP'T OF HOUS., *supra* note 22, at 13.

24. See *id.* (observing the growth of the subprime lending market from \$35 billion in 1994 to \$160 billion in 1999).

25. See STAFF OF H.R. COMM., *supra* note 4, at 10 (suggesting that government-encouraged loosening of lending standards created a false reality and a housing bubble that inevitably burst when low- and moderate-income borrowers could no longer afford their mortgages); see also 12 U.S.C. § 2901(a)(3) (2006) (stating congressional findings that banks "have continuing and affirmative obligation[s] to help meet the credit needs of . . . local communities"); sources cited *supra* note 4 (describing government initiatives to increase home ownership); cf. Zywicki & Adamson, *supra* note 10, at 2 ("Weighed against the losses of the widespread foreclosure crisis are the benefits of financial modernization that have accrued to many American families that have been able to become homeowners who otherwise would not have access to mortgage credit.").

26. Kelly Evans, *Home Prices Fall 0.6% as Rate of Decline Slows*, WALL ST. J., July 1, 2009, at A2 (noting that in the summer of 2009, home prices were down thirty-three percent from their pinnacle in 2006). In fact, home prices in Phoenix and Las Vegas have fallen by more than fifty percent from their peak. *Id.*

27. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (2009), [http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data\\_tool=latest\\_numbers&series\\_id=LNS14000000](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000) (showing an increase in the civilian labor force unemployment rate from 4.4% in March 2007 to 9.8% in September 2009).

28. See, e.g., FED. RESERVE BANK OF CLEVELAND, *supra* note 5, at 9 ("The rate of serious delinquency (payments at least two months past due) for securitized subprime mortgages at least 12 months old more than tripled between 2003 and 2007—to the point that almost one in every five subprime loans at least a year old was not performing.").

29. See, e.g., Johnson, *supra* note 7, at 1177–78 (estimating foreclosures on two million homes financed by subprime mortgages between 2007 and 2009).

30. *Id.* at 1178–79. The damage that abandonment caused to these borrowers' credit was seemingly of little consequence because they had substandard credit to begin with. *Id.*

31. See FED. RESERVE BANK OF CLEVELAND, *supra* note 5, at 10 (explaining the correlation between the City of Cleveland's declining population, unemployment, and high foreclosure rates).

specifically, this section examines the economic loss doctrine, proximate cause, and the manner in which both doctrines impose restrictions on actionable cases. Second, this Note considers the varying degrees of effectiveness of municipal public nuisance claims brought against the gun industry to challenge the gun industry's business practices as an unreasonable interference with a public right. These cases are a point of reference against which Cleveland's public nuisance claim may be examined. Third, this Note presents the factual and legal background of the City of Cleveland's case. Next, this Note examines the rationale of the district court in dismissing the City's public nuisance claim and the validity of its decision in light of the gun cases. Finally, this Note concludes by asserting that the district court decided *City of Cleveland v. Ameriquist Mortgage Securities, Inc.* correctly and that the decision accurately reflects a proper limitation on the breadth of nuisance law.

I. LAYING THE FOUNDATIONAL CONTEXT FOR *CITY OF CLEVELAND V. AMERIQUEST MORTGAGE SECURITIES, INC.*

A. Nuisance Law: Navigating a Fact-Specific Jungle

As Professor William Lloyd Prosser observed, “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’”<sup>32</sup> This is because nuisance law, at its core, amounts to judicial definition and interpretation of reasonableness.<sup>33</sup> The many permutations of nuisance law that attach to land use include moral,<sup>34</sup> aesthetic,<sup>35</sup> and

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32. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984).

33. See Smith, *supra* note 14, at 701–02 (noting a lack of uniformity among jurisdictions because “what is reasonable use and enjoyment is incapable of precise definition; for what is a wrongful interference in one locality . . . may not be one in another residential locale”); see also DAN B. DOBBS, THE LAW OF TORTS 1320 (2000) (explaining that classifying something as a nuisance requires balancing the reasonableness of conflicting uses); John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 313 (2001) (commenting that public nuisance reinforces society's regulation and management of dangers by imposing liability when the risk of danger becomes unreasonable).

34. See, e.g., John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 268–69 (2001) (explaining that a moral nuisance cause of action protects a community's standards of morality by imposing liability for behavior deemed objectionable by a community). For example, the Idaho legislature has determined that “[a]ny and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition” constitutes a moral nuisance. IDAHO CODE ANN. § 52-104(A) (2009).

35. See, e.g., Nancy Perkins Spyke, *The Instrumental Value of Beauty in the Pursuit of Justice*, 40 U.S.F. L. REV. 451, 468–70 (2006) (discussing the increasing acceptance of aesthetic nuisance as a cause of action that furthers the common good through the maintenance of community identities and appearances); see also United States v. County Bd. of Arlington County, 487 F. Supp. 137, 143 (E.D. Va. 1979) (observing that aesthetic nuisances have been recognized “in some instances [where] the erection of high buildings or other ugly objects has

environmental nuisances.<sup>36</sup> Although nuisance law is divided into two categories—public nuisance and private nuisance<sup>37</sup>—the scope of this Note is limited to a thorough consideration of public nuisance.<sup>38</sup>

### *B. Public Nuisance: A Vehicle to Safeguard a Public Right*

The *Second Restatement of Torts* defines a public nuisance as “an unreasonable interference with a right common to the general public.”<sup>39</sup> Courts have defined public rights as “the rights of public health, public safety, public peace, public comfort, and public convenience.”<sup>40</sup> A public nuisance includes conduct that is either continuous or causes substantial, far-reaching effects that the defendant knew or should have known would be a significant detriment to a public right.<sup>41</sup> Due to its protection of a public right, public nuisance is a valuable mechanism to reinforce and define community values by imposing liability for conduct that threatens those values.<sup>42</sup> For instance,

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been prohibited so that a park or a beautiful public building would not be disfigured by the proximity of such structures”); George P. Smith II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 83 (1991) (stating that an aesthetic nuisance cause of action exemplifies notions of economic efficiency and equity).

36. *Ariz. Water Co. v. City of Bisbee*, 836 P.2d 389, 391 (Ariz. Ct. App. 1991) (declaring that the use of effluent waste for fertilization or irrigation purposes without health or environmental agency approval constituted an environmental nuisance); see also Ronald G. Aronovsky, *Back from the Margins: An Environmental Nuisance Paradigm for Private Cleanup Cost Disputes*, 84 DENV. U. L. REV. 395, 399 (2006) (arguing that an environmental nuisance cause of action could be an efficacious solution for allocating the costs of environmental clean-up efforts).

37. See Nagle, *supra* note 34, at 271 (explaining that a private nuisance occurs when one person substantially interferes with the use and enjoyment of another’s land); *supra* note 16 and accompanying text.

38. See WILLIAM Q. DE FUNIAK, *HANDBOOK OF MODERN EQUITY* 60 (2d ed. 1956) (observing that public nuisance “deserves separate consideration” from private nuisance because public nuisance protects the general public welfare).

39. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). Public nuisance has also been described as “a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.” KEETON ET AL., *supra* note 32, at 618. The *Second Restatement of Torts* also explains that a public nuisance can be statutorily defined and carry a criminal penalty. RESTATEMENT (SECOND) OF TORTS § 821B(2)(b), § 821B cmt. c (describing one instance of public nuisance as “conduct . . . proscribed by a statute, ordinance or administrative regulation” and noting the availability of criminal penalties for a public nuisance).

40. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114 (Ill. 2004). In *Beretta*, the Supreme Court of Illinois limited the scope of public nuisance by declining to find a public right “to be free from the threat of illegal conduct by others.” *Id.* at 1114–15.

41. RESTATEMENT (SECOND) OF TORTS § 821B2(c).

42. See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 775 (2001) (highlighting public nuisance as an effective judicial vehicle to “vindicat[e] community values”); see also DE FUNIAK, *supra* note 38, at 70 (“The effectiveness of the interposition of equity and of its injunctive relief to prevent or to put a stop to [a public nuisance] is readily apparent.”); George P. Smith, II, *Re-validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687, 732 (2005) (noting that an anticipatory



courts have found that ownership of an apartment building in which prostitution and drug use were prevalent constituted a public nuisance because it violated community values.<sup>43</sup> A public nuisance claim may be brought by an individual person in only very limited cases; usually, a municipality is best equipped to assert a public nuisance claim on behalf of its citizens.<sup>44</sup>

### 1. *Limiting Nuisance's Breadth: The Economic Loss Doctrine*

The economic loss doctrine bars a nuisance action when a plaintiff seeks purely monetary damages instead of injunctive relief.<sup>45</sup> Many jurisdictions, including Ohio, have adopted this doctrine as a bar on certain tort claims.<sup>46</sup> Some jurisdictions have created an exception to the economic loss doctrine, stating that in instances where a plaintiff has not suffered physical harm or loss of access to property, a public nuisance claim is permitted only when the plaintiff has suffered a "special pecuniary harm and substantial impairment of access."<sup>47</sup> The purpose of the special pecuniary harm exception is to prevent the economic loss doctrine from barring recovery in nuisance actions where the plaintiff suffered judicially recognized special damages.<sup>48</sup>

In *RWP, Inc. v. Fabrizi Trucking & Paving Co.*, the Court of Appeals of Ohio applied the traditional economic loss doctrine to preclude the plaintiffs

nuisance action, when correctly undertaken, is one method of protecting society from potentially great harm).

43. *Lew v. Superior Court*, 25 Cal. Rptr. 2d 42, 43, 47 (Ct. App. 1993) (upholding the ruling of a lower court that the landlords' failure to act reasonably in response to illegal activity in an apartment building constituted a public nuisance).

44. See KEETON ET AL., *supra* note 32, at 646. In most circumstances, a government is best equipped to sue on behalf of its citizens because of policy concerns that a defendant may be exposed to a "multiplicity of actions" if each citizen were permitted to present a public nuisance claim. *Id.* Additionally, resolving public nuisances through litigation is extremely expensive. See, e.g., Note, *A Nuisance Law Approach to the Problem of Housing Abandonment*, 85 YALE L.J. 1130, 1142 (1976).

45. See, e.g., *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007) (reasoning that certain claims involving purely monetary damages are appropriately resolved through a breach of contract claim). The purpose of this limitation is to differentiate between remedies that are available for tort claims and those available for breaches of contract. *Id.*

46. See, e.g., *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704 (Ohio 2005) (characterizing the economic loss rule as precluding recovery on tort claims involving only monetary loss); see also *Ashtabula River Corp. Group II v. Conrail, Inc.*, 549 F. Supp. 2d 981, 987 (N.D. Ohio 2008) (reiterating the economic loss rule adopted by the Supreme Court of Ohio); accord *Duffin v. Idaho Crop Improvement Assoc.*, 895 P.2d 1195, 1200 (Idaho 1995) (adopting the economic loss doctrine in Idaho); *In re Chi. Flood Litig.*, 680 N.E.2d 265, 274 (Ill. 1997) (adopting the economic loss doctrine in Illinois). But see *Adams v. Star Enter.*, 51 F.3d 417, 421, 424-25 (4th Cir. 1995) (stating that, under Virginia law, a plaintiff may recover purely economic damages if the plaintiff can show that the defendant caused damage to a public resource used by the plaintiff).

47. *Stop & Shop Cos. v. Fisher*, 444 N.E.2d 368, 374 (Mass. 1983); accord *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 130 (Iowa 1984).

48. *Neb. Innkeepers*, 345 N.W.2d at 130.

from recovering on their public nuisance claim.<sup>49</sup> In *RWP*, a car wash business and other consumer cable subscribers joined to pursue a public nuisance claim in equity for damages against a trucking company when the company cut bundled telephone cables, causing a loss of telecommunication services to the subscribers.<sup>50</sup> The court rejected this claim under Ohio's acceptance of the economic loss doctrine, reasoning that because there was no tangible injury to a plaintiff's person or property, a public nuisance claim could not succeed.<sup>51</sup> When it is appropriately applied, the economic loss doctrine provides an effective gate-keeping function by filtering out actions that are beyond the scope of nuisance law.

## 2. *A Chain Is Only as Strong as Its Weakest Link: Proximate Cause*

In order to establish standing for a public nuisance claim, a plaintiff must satisfy the proximate cause requirement by showing that the conduct of the defendant is not too remote from the damage caused.<sup>52</sup> Proximate cause generally refers to "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."<sup>53</sup> In other words, if a defendant's conduct is too far removed from the plaintiff's injury in the chain of causation to show a direct relationship between the conduct and the plaintiff's harm, liability does not attach.<sup>54</sup> In a public nuisance claim, the defendant must have a requisite level of control over the conduct that constitutes the alleged nuisance to be held liable.<sup>55</sup>

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49. *RWP, Inc. v. Fabrizi Trucking & Paving Co.*, No. 87382, 2006 WL 2777159, at \*4 (Ohio Ct. App. Sept. 28, 2006).

50. *Id.* at \*1.

51. *Id.* at \*4 ("[A] claim of absolute nuisance . . . requires that the plaintiff sustain injury to property.").

52. *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 132 (Conn. 2001) (applying the remoteness doctrine to bar the plaintiffs' public nuisance claims because the defendant's conduct was too remote from the harm suffered by the plaintiffs "to confer standing on the plaintiffs to complain of [those harms]").

53. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (requiring a direct relationship between the alleged harm and the defendant's conduct in a RICO case). William Lloyd Prosser and W. Page Keeton explain that the proximate cause inquiry turns on "whether the conduct has been so significant and important a cause that the defendant should be legally responsible." *KEETON ET AL.*, *supra* note 32, at 273. This determination requires a consideration of legal policy to determine whether a defendant should be held responsible for the plaintiff's harm. *Id.* (noting that this determination is often a question of whether the defendant is bound by any duty to the plaintiff).

54. *Holmes*, 503 U.S. at 268–69; *see also Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928) ("[W]rong is defined in terms of the natural or probable, at least when unintentional."). Proximate cause requires the court to reach a just result by "declin[ing] to trace a series of events beyond a certain point." *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

55. *See City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 137, 139 (Ill. App. Ct. 2005).

In *City of Chicago v. American Cyanamid Co.*, the City of Chicago brought a public nuisance suit against lead paint manufacturers alleging that the toxic paint's prevalence within the city limits was a public nuisance.<sup>56</sup> The City argued that the manufacturers' continued production and marketing of lead-based paint, even after the hazards of the paint were known, amounted to a public nuisance because the manufacturers knew or should have known of the harm caused by the paint.<sup>57</sup> In rejecting the City's claim, the Appellate Court of Illinois held that the paint was produced decades earlier when its production was legal, and as a result, the defendant's conduct was too far removed from the present harm suffered to hold the defendants liable.<sup>58</sup> Due to this lack of proximate connection, the City failed to satisfy the proximate cause requirement essential to its public nuisance claim.<sup>59</sup>

*C. The Handgun Corollary: The Extent to Which Heavily Regulated Business Practices Can Amount to a Public Nuisance*

Officials in over thirty cities have sought damages from handgun manufacturers under a public nuisance theory of liability.<sup>60</sup> An examination of some of these key cases and the different rationales behind the courts' decisions provides a valuable framework for considering the extent to which a regulated activity—specifically, the manufacturing, marketing, and distributing of a product within an industry—can constitute a public nuisance.

*1. Examples of Failed Public Nuisance Claims: City of Chicago v. Beretta U.S.A. Corp. and Ganim v. Smith & Wesson Corp.*

*a. The Chicago Failure: Illustrating the Limits of the Economic Loss Doctrine and the Public Right Requirement*

In *City of Chicago v. Beretta U.S.A. Corp.*, the City of Chicago sued handgun manufacturers, dealers, and distributors on behalf of its citizens alleging a public nuisance caused by the proliferation of criminal firearm use in the City that constituted unreasonable interference with a public right—the right to be free from danger to one's person and property.<sup>61</sup> The City of Chicago sought monetary damages to reimburse it for expenses used to

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56. *Id.* at 128.

57. *Id.*

58. *Id.* at 139 (explaining that the public policy concerns limiting liability for tortfeasors under the doctrine of proximate cause also apply to public nuisance actions).

59. *Id.* at 139–40.

60. See, e.g., David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1175 (2000) ("The governmental handgun cases have cast renewed light and interest on the law of public nuisance."). Professor Kairys observes the mixed results in these cases, but urges that the handgun cases should nevertheless survive motions to dismiss because the alternative is a continuing proliferation of gun use that is detrimental to society. *Id.* at 1186–87.

61. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1105, 1108–09 (Ill. 2004).

respond to the illegal gun problem.<sup>62</sup> The City alleged that the defendants' conduct was "done with the knowledge, if not the intent, that a significant number of the guns will ultimately find their way into an illegal secondary gun market and then into hands of persons who cannot legally possess those guns within the city of Chicago."<sup>63</sup> The City asserted that such knowledge and conduct by the gun industry resulted in an unreasonable interference with a public right.<sup>64</sup>

The Supreme Court of Illinois adopted the definition and parameters of public nuisance found in the *Second Restatement of Torts*<sup>65</sup> and limited the City's public nuisance claim to "the presence and use of the guns within the city of Chicago" because the defendants' use of their own property to manufacture guns was not a public nuisance.<sup>66</sup> In assessing whether the City asserted a viable public right, the court expressed skepticism over whether freedom from the threat of another's illegal conduct is a public right sufficient to allege a public nuisance cause of action, as opposed to a private right incapable of anchoring a public nuisance claim.<sup>67</sup> The court held that no such public right existed, reasoning that it is necessary to guard against excessive and "unprecedented expansion of the concept of public rights" and to limit the scope of public nuisance.<sup>68</sup>

The *Chicago* court also held that the economic loss doctrine prohibited the City's claim for monetary damages,<sup>69</sup> focusing its application of the economic loss doctrine on the public policy goals of preventing unlimited economic tort liability.<sup>70</sup> Moreover, the court found no need to differentiate between public and private nuisances in applying the economic loss doctrine, holding that the

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62. *Id.* at 1109. The City's theory for damages was that the firearm industry's conduct imposed additional expenses on the City's daily operations. *Id.* The City also requested injunctive relief predicated on the claim that, absent an injunction, the alleged harm would continue. *Id.*

63. *Id.* The City's concerns were legitimate because, even though it had enacted strict gun-control laws, a substantial illegal gun market still existed that fueled high rates of crime within the city. *Id.* at 1106–08.

64. *Id.* at 1109.

65. *Id.* at 1111 ("The Restatement definitions of public and private nuisance are consistent with Illinois law."); see also *supra* notes 39–42 (explaining public nuisance law as promulgated by the *Second Restatement of Torts*).

66. *Beretta*, 821 N.E.2d at 1111 (explaining that although the defendants' conduct on their own property could not be a nuisance, "neither the use or misuse of land nor the invasion of property rights of another is required for a public nuisance to be found, [so] plaintiff's theory of liability is not absolutely foreclosed by the existing common law of public nuisance").

67. *Id.* at 1114, 1116.

68. *Id.* at 1116. The court noted public policy concerns in its conclusion that the gun manufacturers and distributors owed no duty to the general public. *Id.* at 1126.

69. *Id.* at 1143.

70. *Id.* at 1140 ("[A] defendant who could be held liable for every economic effect of its tortious conduct would face virtually uninsurable risks, far out of proportion to its culpability.").

doctrine applies equally to both types of nuisance claims.<sup>71</sup> The court ultimately ruled that because the City of Chicago failed to allege injury to person or property and instead sought damages for purely economic loss, it was therefore barred under the economic loss doctrine and lacked standing.<sup>72</sup> The *Chicago* court's limitation of public nuisance demonstrates the proper application of the economic loss doctrine's bar on purely monetary tort claims.<sup>73</sup>

*b. Ganim v. Smith & Wesson Corp.: Illustrating the Limitations of Proximate Cause*

In *Ganim v. Smith & Wesson Corp.*, the City of Bridgeport, Connecticut, brought a similar public nuisance claim against a gun manufacturer.<sup>74</sup> The City alleged that it suffered harm in the form of increased costs for law enforcement, declining property values, a victimized citizenry, and an overall decrease in public safety and welfare.<sup>75</sup> Although the City's allegations focused on the destruction caused by firearms in the United States and Bridgeport,<sup>76</sup> the Supreme Court of Connecticut concentrated on the causal relationship between the gun industry's conduct and the alleged harm to the City.<sup>77</sup> Responding to the City's broad claims of harm, the court narrowed the issues it would consider and refused to determine "whether, as a matter of public policy, handguns ought to be subject to greater controls than those to which they currently are subject, at either the state or federal level."<sup>78</sup> Rather, the *Ganim* court limited the scope of its review to whether the mayor, acting in his official capacity on behalf of Bridgeport, and the City itself, possessed standing to bring a claim against gun manufacturers and retailers.<sup>79</sup>

In considering the City's allegations of harm, the court described the relationship between the proximate cause and standing requirements for public nuisance claims and stated that its "standing jurisprudence consistently has embodied the notion that there must be a colorable claim of a direct injury to

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71. *Id.* at 1143.

72. *Id.* at 1142-43.

73. See, e.g., Culhane & Eggen, *supra* note 33, at 328 (explaining the fundamental theory behind the economic loss doctrine as applied to municipal suits). The economic loss doctrine's application to municipal cases is premised on the idea that, in a public nuisance case, a city fights on behalf of the public, whereas in a private nuisance case, the city is concerned solely with its own losses; thus, the city's different roles in these different suits should remain separate. *Id.*

74. *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 113-16 (Conn. 2001) (detailing the plaintiff's allegations that the gun-retailer defendants knew or should have known that their handguns were used for criminal activity).

75. *Id.* at 118.

76. See *id.* at 109-12.

77. See *id.* at 123-24.

78. *Id.* at 117.

79. *Id.*

the plaintiff, in an individual or representative capacity.”<sup>80</sup> Thus, if the gun industry’s conduct only remotely caused the alleged injury, the City would fail to satisfy the proximate cause requirement and would lack standing to bring its public nuisance claim.<sup>81</sup>

Addressing proximate cause, the *Ganim* court examined each link in the chain of causation to determine the extent of attenuation between the gun industry’s conduct and the alleged harm to the plaintiffs.<sup>82</sup> The court found that many links in the chain of causation separated the manufacturing of the guns from their criminal use and that such links in the chain were “strongly suggestive of remoteness.”<sup>83</sup> Moreover, the causal chain was likely severed by other contributing factors, such as poverty, drug use, illiteracy, and a host of other urban realities.<sup>84</sup> As a result, Bridgeport’s public nuisance claim failed to satisfy the requisite level of causal strength, causing its claim to fail due to a lack of standing.<sup>85</sup>

*2. The Gun Industry Is Not out of the Woods Yet: City of Cincinnati v. Beretta U.S.A. Corp. and the Acceptance of Similar Public Nuisance Theories*

The City of Cincinnati asserted a public nuisance claim against the firearm industry that mirrors, in both form and substance, those claims made by the Cities of Chicago and Bridgeport.<sup>86</sup> The Supreme Court of Ohio also adopted the broad definition of public nuisance found in the *Second Restatement of Torts* and allowed the City of Cincinnati’s claim to fall within the ambit of public nuisance law, concluding that a public nuisance claim can arise from a harm caused by a product as long as that harm “unreasonably interferes” with a

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80. *Id.* at 119 (requiring that a direct relationship exist between the plaintiffs’ injuries and the defendants’ conduct to establish standing).

81. *See id.* at 119–20 (highlighting the importance of the proximate cause inquiry as “part of the judicial task, based on policy considerations, of setting some reasonable limits on the legal consequences of wrongful conduct”).

82. *Id.* at 123.

83. *Id.* at 123–24. The court found that the links in the causal chain included the manufacture of the guns, the lawful sale to distributors, subsequent sale to retailers, subsequent sale to buyers, the entry of guns into illegal markets, the misuse of guns to perpetrate crime, the spending of funds by the municipality to combat and treat the crime, and finally, the other alleged harms. *Id.*

84. *Id.* at 124 (“[F]actors other than the defendants’ manufacture, advertisement, distribution and retail sales of guns contribute in significant measure to the various harms claimed by the plaintiffs.”).

85. *Id.* at 132.

86. *See City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1140 (Ohio 2002) (“[T]he complaint asserts, due to [the gun industry’s] intentional and negligent conduct and their failure to make guns safer, [they] have fostered the criminal misuse of firearms, helped sustain the illegal firearms market in Cincinnati, and have created a public nuisance.”).

public right.<sup>87</sup> The court rejected the defendants' claim that they could not be liable for a public nuisance because the guns were out of the industry's control at the time of the alleged injury.<sup>88</sup> Furthermore, the court dismissed the defendants' argument that the City's claim was precluded by the comprehensive regulatory scheme that governed the gun industry because the distribution practices at issue fell outside the scope of any gun industry regulation.<sup>89</sup> Courts in Indiana<sup>90</sup> and Massachusetts<sup>91</sup> have upheld similar causes of action where municipalities brought public nuisance claims against the firearm industry. Through its *City of Cincinnati v. Beretta U.S.A. Corp.* decision, the Supreme Court of Ohio joined Indiana and Massachusetts in recognizing that the lawful distribution of handguns could constitute a public nuisance.<sup>92</sup>

### 3. Lessons Learned: Making Sense of the Handgun Cases

Most courts have been reluctant to uphold a municipality's claim of public nuisance against the firearm industry for its business practices.<sup>93</sup> The question in these cases—and the question considered in this Note's examination of *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*—is how broadly will public nuisance law be extended to an industry's legal business practices?<sup>94</sup> Important policy considerations weigh heavily on this question.<sup>95</sup> Expanding the scope of public nuisance to include legal business practices with unforeseeable results could have administratively untenable implications.<sup>96</sup>

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87. *Id.* at 1142 (noting that public nuisance claims often, but not exclusively, arise from the use of real property or per se violations).

88. *Id.* at 1143 (reasoning that although the guns were not in the physical control of the defendants, the firearm industry controlled its business practices, which facilitated the creation and support of the illegal gun market).

89. *Id.*

90. *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231–32 (Ind. 2003) (concluding that the City stated a cognizable public nuisance claim under Indiana law).

91. *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at \*14 (Mass. Super. Ct. July 13, 2000) (holding that the City properly pled a public nuisance claim against the gun industry under Massachusetts law, despite its unique theory).

92. *Beretta*, 768 N.E.2d at 1143–44.

93. See, e.g., *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 911 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 133–34 (Conn. 2001); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004).

94. See Kairys, *supra* note 60, at 1175.

95. See *id.* at 1181–82 (identifying the interplay between public nuisance claims and the role of executive actors in controlling public safety); cf. Culhane & Eggen, *supra* note 33, at 317 (expressing the possibility that certain public nuisance claims could “amount to second-guessing of legislative choices”).

96. See *New York ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 202–03 (App. Div. 2003) (rejecting a claim of public nuisance against gun manufacturers and predicting that the court may face an “explosion of litigation” if the scope of public nuisance is expanded). The court explained:

Yet, others have posited that nuisance law may provide an appropriate mechanism to address claims such as these.<sup>97</sup> It is within this climate that Cleveland's novel public nuisance claim against the lenders charged with precipitating the home foreclosure crisis must be examined to determine whether it conforms with the basic tenets of public nuisance law.

## II. A CITY IN DIRE STRAITS: CLEVELAND'S SUBPRIME MORTGAGE AND FORECLOSURE CRISIS PRECIPITATES A PUBLIC NUISANCE CLAIM

As a result of the housing bubble burst,<sup>98</sup> the average price of a home in Cleveland plummeted by seventy-five percent between 2007 and 2008,<sup>99</sup> and Cleveland suffered higher foreclosure rates than the rest of the country.<sup>100</sup> Due

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One of our concerns in this public nuisance case of first impression is not . . . a limitless number of private plaintiffs who would likely appear at the courthouse steps were we to allow this claim to proceed. Rather, we see on the horizon, were we to expand the reach of the common-law public nuisance tort in the way plaintiff urges, the outpouring of an unlimited number of theories of public nuisance claims for courts to resolve and perhaps impose and enforce—some of which will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motivated and exploitative.

*Id.* But see Eric L. Kintner, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, 1238 (2005) (asserting that even in spite of a potential slippery slope for increasing lawsuits against other industries, there is no public policy concern significant enough to relieve the gun industry of liability for public nuisance); Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1847 (2008) (suggesting that although gun public nuisance claims have not met their desired success, they have raised awareness of gun-related harms and promoted helpful policy debates).

97. See Kairys, *supra* note 60, at 1186–87 (“If the usual standards governing public nuisance claims for the last two centuries are applied, the governmental handgun cases should at least survive motions to dismiss and for summary judgment.”).

98. See *supra* notes 2–6, 20–31 and accompanying text (outlining the underpinnings of the foreclosure crisis where—through government encouragement—an untenable number of low- to moderate-income families purchased home mortgages and created a housing bubble that was destined to burst).

99. MALLACH, *supra* note 3, at 3. The median sales price for a home in the first half of 2007 was \$62,000. *Id.* By the first half of 2008, the median sales price of a home in Cleveland had dramatically fallen to \$15,500—a 75% decline. *Id.* By the fall of 2009, Cleveland's home prices had regressed to 2001 levels. David Streitfeld, *Fears of a New Chill in Home Sales*, N.Y. TIMES, Oct. 28, 2009, at B1.

100. FED. RESERVE BANK OF CLEVELAND, *supra* note 5, at 10 (stating that Cuyahoga County, which includes Cleveland, experienced a subprime foreclosure rate of 14% by the end of 2008 compared to a rate of 8.8% for foreclosures nationwide); see also Kyle Cutts, Comment, *City on the Brink: The City of Cleveland Sues Wall Street for Public Nuisance*, 58 CASE W. RES. L. REV. 1399, 1408 (2008) (commenting on the severity of the foreclosure crisis in Cleveland and stating that the city has suffered negative consequences of the crisis more than many other cities).



to the massive rate of foreclosures<sup>101</sup> brought about by the precipitous decline in home prices, “the social and economic fabric of neighborhoods [became] destabilized,” imposing many new costs on the municipality.<sup>102</sup> The connection between subprime lending practices and the areas of lower socioeconomic demographics that were most affected by the sobering consequences of the burst of the housing bubble is evident; the lower income neighborhoods ravaged by abandonment and foreclosure are the precise demographic that lenders targeted with subprime loans.<sup>103</sup>

Seeking redress from the increased costs caused by the foreclosures, the City of Cleveland filed a public nuisance claim against twenty-one lenders.<sup>104</sup> The City alleged that “the lenders’ reckless securitization of subprime loans—packaging them into tradable securities and selling them—resulted in a widespread foreclosure and abandonment problem.”<sup>105</sup> Further, Cleveland asserted that it had endured more particular harms than other cities because of its general socioeconomic demographics consisting of high poverty rates and stagnant economic growth.<sup>106</sup> Given this, Cleveland asserted that providing the subprime loans and packaging them into mortgage-backed securities was a public nuisance because the socioeconomic nature of the city made the dramatic increase in foreclosures a reasonably foreseeable result of these business practices.<sup>107</sup> Accounting for the widespread harm, the City of Cleveland sought damages for the costs imposed on the city by the foreclosure crisis, specifically, the city’s diminished tax base and the costs of maintaining

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101. Robert J. Aalberts, *From the Editor-in-Chief: Are Subprime Mortgages a Nuisance to Society?*, 37 REAL EST. L.J. i, ii (2008) (stating that by February 2008, roughly four percent of the houses in Cleveland had been foreclosed on).

102. MALLACH, *supra* note 3, at 3 (explaining that as a result of the foreclosures, the City’s costs increased, including “more expenditures for policing and firefighting, increased code enforcement efforts, and more nuisance properties in need of demolition” came to the fore of Cleveland’s fiscal considerations). The damage from the foreclosures in Cleveland snowballed: foreclosed properties became vacant and abandoned, leading to a lack of upkeep that caused property damage that, in turn, devalued surrounding properties, resulting in neighborhoods of abandoned, blighted, and devalued properties. *Id.*

103. *Id.* at 4 (observing that the number of foreclosures “cluster—often in neighborhoods largely populated by people of color—which three and four years ago saw concentrations of subprime lending”); see also FED. RESERVE BANK OF CLEVELAND, *supra* note 5, at 10 (“Researchers have found that foreclosures can have serious spillover effects—decreasing the values of neighboring houses, incurring costs to governments, and leading to increased crime.”).

104. Maag, *supra* note 8.

105. Johnson, *supra* note 7, at 1213.

106. *City of Cleveland v. Ameriquest Mortgage Sec., Inc.*, 621 F. Supp. 2d 513, 516 (N.D. Ohio 2009). The City claimed that subprime lending in Cleveland was “categorically inappropriate” because of the city’s “high poverty rate, sluggish economy, limited employment opportunities, and stable but not booming property values.” *Id.*

107. *Id.*

and demolishing foreclosed properties that had become blight.<sup>108</sup> The City presented this novel theory of public nuisance to the United States District Court for the Northern District of Ohio in *Ameriquest*.<sup>109</sup>

Novelty alone, however, could not overcome significant roadblocks to the City's claim. State law preemption issues initially precluded the City's suit from going forward.<sup>110</sup> Furthermore, the economic loss doctrine, public right, and proximate cause requirements presented insurmountable obstacles to the success of Cleveland's attempt to recover damages from the lenders.<sup>111</sup> For all these reasons, the court rejected the City's public nuisance claim<sup>112</sup> and, in so doing, recast the appropriate boundaries of nuisance law by declining to apply public nuisance liability to lending practices. In effect, the *Ameriquest* court's decision prevented a further complication of the already "impenetrable jungle" of nuisance law.<sup>113</sup> A contrary ruling would have generated more questions than answers.<sup>114</sup>

### III. CITY OF CLEVELAND V. AMERIQUEST MORTGAGE SECURITIES, INC.: DEMARCATING AN APPROPRIATE LIMITATION OF PUBLIC NUISANCE LAW

#### A. State-Law Preemption as an Initial Bar

After the City of Cleveland filed its public nuisance suit, the lender-defendants initially moved to dismiss the claim on the ground that it was preempted by state law.<sup>115</sup> The lenders cited an Ohio statute providing that

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108. *Id.* at 516, 525. The City of Cleveland calculated its claimed damages based on the costs of responding to property foreclosures and lost tax revenues resulting from "the depreciating effect foreclosures have had on the affected homes and surrounding properties." *Id.* at 516.

109. *See id.* at 515–16; *see also* Johnson, *supra* note 7, at 1198 (noting that the Cities of Cleveland, Buffalo, and Baltimore have all filed "novel large-scale litigation" against lenders that contributed to the foreclosure crisis).

110. *See* discussion *infra* Part III.A.

111. *See* discussion *infra* Parts III.B–D (endorsing the district court decision holding that the economic loss doctrine, public right requirement, and proximate cause standing requirement each provide appropriate bars to the City of Cleveland's recovery of foreclosure-related damages from the lender-defendants).

112. *Ameriquest*, 621 F. Supp. 2d at 536.

113. *See supra* text accompanying note 32.

114. *See, e.g., infra* note 158. Presuming, *arguendo*, that the City of Cleveland's claim had succeeded, the decision would have created a great influx of litigation requiring resolution of similar claims made by other cities that would surely flood the courts. Such a decision would have created a green light for other cities reeling from the foreclosure crisis—even those cities with more desirable socioeconomic demographics that may not have been harmed as severely as Cleveland. Courts would be forced to determine what socioeconomic level should serve as a threshold for colorable claims. Such determinations would be complex and would be a drain on limited judicial resources. Limiting the breadth of public nuisance at this juncture, as the *Ameriquest* court did, resolves this dilemma by providing administrative clarity. *See* New York *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 202–03 (App. Div. 2003).

115. *Ameriquest*, 621 F. Supp. 2d at 516.

state law governed the regulation of banks and lending institutions.<sup>116</sup> Rejecting the City's asserted defense that its public nuisance action was not a regulatory matter—and thus not subject to the preemption statute—the court dismissed the City's complaint.<sup>117</sup> Although Cleveland's public nuisance claim was preempted by state law, the court nevertheless analyzed the substance of the nuisance claim to explain additional reasons for dismissing the complaint; in doing so, the court established the proposition that the unfavorable lending practices at issue are not within the realm of nuisance law.<sup>118</sup>

*B. The Ameriquest Court's Adherence to the Economic Loss Doctrine  
Prevented Recovery*

In its attempt to overcome the economic loss doctrine hurdle—which bars recovery for a tort-based injury alleging purely economic loss—the City of Cleveland argued that Ohio did not follow traditional application of the doctrine in public nuisance cases.<sup>119</sup> The district court flatly rejected this contention as a categorical distortion of Ohio law and applied the economic loss doctrine to the public nuisance claim.<sup>120</sup> The City argued in the alternative that if the economic loss doctrine applied, it did not bar the City's claim because the City's damages were not solely economic, but were related to property damage.<sup>121</sup> The court found this argument unpersuasive because the City had no recognizable property interest in the foreclosed properties and did not own the properties at the time the foreclosures caused the harm.<sup>122</sup> Because Cleveland failed to show that it had any property interest that was

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116. *Id.* at 517; see OHIO REV. CODE ANN. § 1.63(A)–(B) (LexisNexis 2009). The Code states:

Any ordinance, resolution, regulation, or other action by a municipal corporation or other political subdivision to regulate, directly or indirectly, the origination, granting, servicing, or collection of loans or other forms of credit constitutes a conflict with the Revised Code . . . and with the uniform operation throughout the state of lending and other credit provisions, and is preempted.

OHIO REV. CODE ANN. § 1.63(B).

117. *Ameriquest*, 621 F. Supp. 2d at 518, 520.

118. *Id.* at 520 (“Even if not preempted by state law, however, the City’s claim fails as a matter of law on several other grounds. The Court turns to the substance of the public nuisance claim to address these additional bases for dismissal.”).

119. *Id.* at 522.

120. *Id.* (“[T]he City’s contention that Ohio courts do not apply the economic loss doctrine in public nuisance cases is palpably false, and its direct converse is true.”). In ruling on this issue, the court relied in part on precedent established in *RWP, Inc. v. Fabrizi Trucking & Paving Co.*, No. 87382, 2006 WL 2777159, at \*4 (Ohio Ct. App. Sept. 28, 2006). See *supra* notes 49–51 and accompanying text.

121. *Ameriquest*, 621 F. Supp. 2d at 525 (“[T]he City seeks to recover for alleged physical damage to properties it did not own, but that were owned by someone else—i.e., the homeowners that went through foreclosure.”).

122. *Id.* at 526.

injured, the court found that the relief sought was purely economic, and it ruled that the economic loss doctrine barred recovery under the City's public nuisance theory.<sup>123</sup>

The *Ameriquest* court's holding placed proper limits on the scope of public nuisance law, and its application of the economic loss doctrine followed the approaches of other jurisdictions that have barred public nuisance claims arising from business practices.<sup>124</sup> By applying the economic loss doctrine to a public nuisance allegation against lenders in an attempt to recover costs associated with foreclosures, the district court achieved a consistency with the doctrine's application in the handgun cases.<sup>125</sup> The same policy concerns underlying the doctrine's application in the public nuisance handgun cases also apply to *Ameriquest*.<sup>126</sup> Restricting liability based on the economic loss doctrine to exclude purely monetary claims achieves the goal of the doctrine—preventing an overly litigious society where the slightest negative economic effect of a defendant's conduct would impose upon the defendant liability far exceeding its proportion of fault.<sup>127</sup> The *Ameriquest* court properly applied the economic loss doctrine's limitation on public nuisance claims and resisted the City's attempt to subvert the doctrine, based on the undesirable consequences such subversion would cause.

### C. Extensive Regulation Evinces No Unreasonable Interference with a Public Right

Generally, Ohio courts have precluded public nuisance claims when the alleged nuisance is actually a legally sanctioned activity.<sup>128</sup> Despite this precedent, Cleveland contended that otherwise legal activity, when performed negligently, gave rise to a cognizable public nuisance claim.<sup>129</sup>

The court explained that the City “frame[d] the issue [im]properly” by failing to distinguish between “lawful” conduct and conduct that is “subject to regulation and, within the framework of a regulatory scheme, encouraged.”<sup>130</sup>

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123. *Id.*

124. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1139–40 (Ill. 2004).

125. *See supra* Part I.C.

126. *See, e.g., Chicago*, 821 N.E.2d at 1140 (recognizing that the economic loss doctrine serves as a valuable tool to prevent open-ended tort liability). As in *Beretta*, the *Ameriquest* court found that the economic loss doctrine applied to limit the scope of monetary recovery when no damage was incurred to a person or property right. *See Ameriquest*, 621 F. Supp. 2d at 525.

127. *Chicago*, 821 N.E.2d at 1140 (noting that liability for minute economic effects would make most businesses practically uninsurable because of the high risk of nuisance liability).

128. *Ameriquest*, 621 F. Supp. 2d at 526 (“The nebulous and malleable nature of the claim notwithstanding, Ohio courts have long imposed the following concrete limitation on public nuisance claims: ‘What the law sanctions cannot be held to be a public nuisance.’” (quoting *Allen Freight Lines, Inc. v. Consol. Rail Corp.*, 595 N.E.2d 855, 857 (Ohio 1992))).

129. *Id.*

130. *Id.*

The court held that even if the lender-defendants acted negligently, their conduct was exempt from public nuisance liability if the conduct complied with the governing regulatory scheme.<sup>131</sup> The court noted the extensive federal impetus behind making home loans available to low- and moderate-income families<sup>132</sup> and examined whether the regulation of such loans was comprehensive enough to sanction the defendants' actions and warrant dismissal of the City's claim.<sup>133</sup> The court also cited the public policy concerns that would arise were it to question the "wisdom" of decisions made by legislatures and officials specifically charged with regulating this conduct.<sup>134</sup> Ultimately, the court held that the City of Cleveland was challenging conduct that complied with the applicable regulatory scheme, and therefore, the claim failed as a matter of law.<sup>135</sup> Without asserting any claims against conduct *not* in compliance with the legal regime, the City failed to prove a public nuisance and thereby provided the court with another basis for dismissing the suit.<sup>136</sup> The *Ameriquist* court's refusal to expand the scope of public rights parallels the *City of Chicago v. Beretta U.S.A. Corp.* court's refusal to include the right to be free from the threat of illegal conduct within the protections of public nuisance law.<sup>137</sup> The same policy considerations that drove the Supreme Court of Illinois' ruling in *Beretta* apply equally to *Ameriquist*.<sup>138</sup>

Expanding the scope of public rights, as urged by the City of Cleveland, would erode the boundaries of nuisance law that guard against an overly broad imposition of liability.<sup>139</sup> Further, similar to *City of Chicago v. American Cyanamid Co.*, because the *Ameriquist* lender-defendants' conduct was legally sanctioned, even encouraged, when it was commissioned,<sup>140</sup> there is a persuasive argument that no unreasonable interference with a public right

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131. *Id.* at 527–28.

132. *See id.* at 529–30; *see also supra* note 25 and accompanying text (discussing governmental initiatives to increase the availability of mortgages for low- and moderate-income housing).

133. *Ameriquist*, 621 F. Supp. 2d at 529–30 ("The picture that develops from an overview of [federal] laws and agency actions is not just one of significant regulation, but of express governmental encouragement of the type of lending that forms the basis for the City's claim.").

134. *Id.* at 531.

135. *Id.*

136. *Id.*

137. *See City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114–16 (Ill. 2004) (explaining that such a right may be an individual right rather than a public right).

138. *See id.* at 1116; *see also supra* Part I.C.1.a (discussing the policy rationale behind the Supreme Court of Illinois' decision in *Beretta*).

139. *Chicago*, 821 N.E.2d at 1116. The *Beretta* court was "reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it." *Id.*

140. *See* STAFF OF H.R. COMM., *supra* note 4, at 2, 5–6 (describing the federal government's practices to coerce and incentivize mortgage lenders to relax their lending standards).

occurred.<sup>141</sup> The *Ameriquest* court factored into its analysis the existence of federal and state statutory regulations with which the lender-defendants complied, and correctly applied public nuisance jurisprudence to bar the City's claim.<sup>142</sup> *City of Cincinnati v. Beretta U.S.A. Corp.* can be distinguished from *Ameriquest* because the court in *Chicago* notably—and wrongly—diluted its consideration of whether any comprehensive regulatory schemes governed the defendants' conduct in determining if an unreasonable interference with a public right occurred.<sup>143</sup> A holding to the contrary that dismisses a defendant's compliance with the regulations governing the conduct at issue rubs against common sense. The primary purpose of these regulatory schemes would be negated if activities that fall within their scope could be attacked as public nuisances. The government's failure to recognize and regulate for potentially disastrous conduct should not create a back door to relief when a defendant's conduct otherwise complies with the regulatory scheme.

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141. *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 139 (Ill. App. Ct. 2005) (“[T]he conduct of defendants in promoting and lawfully selling lead-containing pigments decades ago, which was subsequently lawfully used by others, cannot be a legal cause of plaintiff's complained-of injury.”). The court noted that the presence of “intact lead-based paint” was not enough to create a “lead hazard” under the Lead Poisoning Prevention Act. *Id.* at 132 & n.3. Similarly, because the conduct of the lenders in *Ameriquest* was sanctioned by federal and state housing regulations, the City of Cleveland could not maintain a public nuisance claim against the lenders because it could not prove unreasonable interference with a public right. *See Ameriquest*, 621 F. Supp. 2d at 531; STAFF OF H.R. COMM., *supra* note 4, at 2, 5–6.

142. *See Ameriquest*, 621 F. Supp. 2d at 528–29 (discussing applicable federal and state law). If the alleged nuisance stems from conduct that is subject to substantial regulation by the state, then the administrative or legislative forum, rather than the courtroom, is the appropriate venue to check unscrupulous practices. *See, e.g.,* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, U. CIN. L. REV. 741, 805–06 (2003) (attributing the reduction in government public nuisance actions during the “Progressive Era and New Deal” to “the development of comprehensive statutory and regulatory schemes that substituted other means of regulation for many former targets of public nuisance prosecutions”); David Schmudde, *Responding to the Subprime Mess: The New Regulatory Landscape*, 14 FORDHAM J. CORP. & FIN. L. 709, 770 (2009) (calling for “significant new rules” to rebound from the foreclosure crisis and explaining that the costs of further regulation are reasonable in light of the costs associated with recovering from the crisis). *But cf.* Robert H. Cutting & Lawrence B. Cahoon, *The “Gift” That Keeps on Giving: Global Warming Meets the Common Law*, 10 VT. J. ENVTL. L. 109, 127 (2008) (discussing the European Union's failure to comply with established caps on air quality and emissions and arguing that public nuisance actions should be allowed when there is “no direct mechanism to provide redress if the regulatory scheme proves inadequate”).

143. *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002). The Supreme Court of Ohio acknowledged that “a comprehensive regulatory scheme involving the manufacturing, sales, and distribution of firearms” existed. *Id.* Nonetheless, it circumvented this bar by finding that a public nuisance could still exist because the regulatory scheme did not specifically address the distribution practices of which the City complained. *Id.*

#### D. Tripping over the Final Hurdle: Insufficient Proximate Cause

In *Ameriquest*, the lender-defendants also asserted that their activities did not proximately cause the harm alleged by the City.<sup>144</sup> By analyzing the chain of causation in a fashion similar to that in *Ganim v. Smith & Wesson Corp.*,<sup>145</sup> the *Ameriquest* court found that the connection between the lenders' actions and the City's alleged harm was too attenuated to satisfy the proximate cause requirement.<sup>146</sup> Cleveland's public nuisance claim hinged on connecting the lenders' packaging of subprime loans into mortgage-backed securities to the city's foreclosure crisis.<sup>147</sup> After examining the specific facts in the case, the *Ameriquest* court found that there were many intermediate parties in the causal chain between the defendants and the property foreclosures.<sup>148</sup> The court also highlighted that it was "someone—very importantly, not [the lender-defendants]—[who] foreclosed on the property."<sup>149</sup> Given the various intervening and superseding factors that contributed to Cleveland's foreclosure crisis, the court reasoned that it was impossible for the City to meet the proximate cause requirement because deciphering specific shares of liability would be impracticable.<sup>150</sup>

The attenuated chain of causation in *Ameriquest* resembles that articulated in *Ganim*.<sup>151</sup> Indeed, just as there were numerous factors other than the gun industry's practices that contributed to the alleged gun-related public nuisance in *Ganim*, there were several factors other than the lenders' business practices that led to the high rates of foreclosure in *Cleveland*.<sup>152</sup> Factors "[c]omplicat[ing] the calculus of attributable damages"—including the housing bubble burst and rising unemployment rates—prompt the conclusion that the *Ameriquest* court correctly denied the City's standing due to a lack of proximate cause.<sup>153</sup> Additionally, as in *Ganim*, the *Ameriquest* court appropriately refused to disregard established nuisance law in lieu of resolving

144. *Ameriquest*, 621 F. Supp. 2d at 532 (discussing the City's failure to establish proximate cause when it did not prove a direct link between its injury and the lender-defendants' conduct).

145. See *supra* notes 82–85 and accompanying text (recounting the causal chain discussed in *Ganim v. Smith & Wesson Corp.*).

146. *Ameriquest*, 621 F. Supp. 2d at 533 (explaining that the damages for which third parties—such as borrowers and investors—would be responsible may be virtually inseparable from the damages attributable to the defendants).

147. *Id.* at 534.

148. *Id.* (concluding that the lender-defendants' actions were separated from the City's damages by a long chain of interceding events).

149. *Id.*

150. *Id.* at 535 ("Sorting out these contributing factors in an effort to assign liability would be a speculation-laden, uncertain endeavor.").

151. See *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 129–30 (Conn. 2001).

152. *Id.* at 124–26; see also *supra* text accompanying notes 2–6, 20–31 (discussing the lending practices and contributing factors—such as the burst of the housing bubble—that led to the foreclosure crisis and to widespread default among subprime borrowers in Cleveland).

153. *Ameriquest*, 621 F. Supp. 2d at 536.

a policy debate over methods of coping with the foreclosure crisis and correcting past wrongs.<sup>154</sup> By ruling that proximate cause was not satisfied in *Ameriquest*, the court preserved the sanctity of public nuisance through an accurate demarcation of its boundaries and limits—a demarcation anchored to the principle that societal reasonableness is obtained by balancing competing interests.<sup>155</sup>

#### IV. CONCLUSION

The limitations imposed on a public nuisance cause of action<sup>156</sup> provide necessary legal checks that prevent an impermissible extension of public nuisance claims to activities that fall outside the scope of public nuisance law.<sup>157</sup> The lending activities engaged in by the twenty-one lenders in *City of Cleveland v. Ameriquest Mortgage Securities, Inc.* fell outside the reach of public nuisance, as the law should be correctly applied. Allowing the City of Cleveland's public nuisance claim to stand—notwithstanding the state-law preemption issue—would have amounted to a perversion of the traditional law of public nuisance.<sup>158</sup> Such checks on an unfettered expansion of this cause of action are necessary to prevent an overly litigious culture in which public nuisance claims run rampant.<sup>159</sup> Allowing Cleveland's public nuisance claim to stand would have set the proverbial wheels in motion toward undesirable results where financial liability would be imposed on businesses for any

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154. See *id.*; cf. Oren Bar-Grill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 70 (2008) (explaining that there are other judicial mechanisms—such as contract law and bankruptcy—to protect consumers from unscrupulous lending practices).

155. See Smith, *supra* note 14, at 699 (“[B]y its reasonable application, [nuisance law] has sought to effect a responsible, balanced approach[,] . . . which seeks to accommodate fundamental principles of utilitarianism . . . guided as such by a standard of reasonableness effected by application of a balancing test.”).

156. See *supra* Parts III.B–D (discussing the economic loss doctrine, public right requirement, and proximate cause requirement as limits on a claim of public nuisance).

157. See Richard E. Gottlieb & Andrew J. McGuinness, *Subprime Lending as a Public Nuisance: Casting Blame on Mortgage Lenders and Wall Street for Inner City Blight*, 62 CONSUMER FIN. L.Q. REP. 4, 5 (2008) (discussing the possibly overwhelming complexities of determining causation and calculating damages in this type of public nuisance litigation).

158. Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 910 (2004) (cautioning against a distortion of public nuisance law alleged by government claims). This Note is sympathetic, however, to the political pressures on government officials to effectuate some retribution against those perceived to be the cause of the foreclosure problem. See Kermit J. Lind, *The Perfect Storm: An Eyewitness Report from Ground Zero in Cleveland's Neighborhoods*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 237, 253 (2008) (explaining that governments facing steep costs caused by the foreclosure crisis “will be compelled to seek relief”). But see Gottlieb & McGuinness, *supra* note 157, at 11 (“With so much misery to go around, for cities to seek to single out lenders as additionally liable, not only for their own losses but the losses of others, as a result of unsuccessful loans, seems blatantly misguided.”).

159. See *New York ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 202–03 (App. Div. 2003).



unfavorable action, no matter how minute or attenuated its connection to a perceived harm.<sup>160</sup> Although considerable debate surrounds the nature and breadth of nuisance law,<sup>161</sup> the activities complained of by the City of Cleveland must necessarily fall outside nuisance law's reach. The limitation endorsed by the *Ameriquet* court accords with the common law, but, perhaps more importantly, it is the *correct* application of the law. This framework will ensure the continued economic advancement of society<sup>162</sup> through the careful imposition of reasonable limits on government public nuisance suits.

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160. See Culhane & Eggen, *supra* note 33, at 329 (cautioning that "the very power of public nuisance law counsels against its promiscuous use").

161. See, e.g., Nagle, *supra* note 34, at 270–71 (discussing the debate surrounding the appropriate threshold for a proper cause of action under nuisance law).

162. Limiting the scope of public nuisance to achieve this goal is even more important in an age where recovery from the economic crisis after the housing bubble burst has been slow to progress. For example, new home construction in October 2009 was 10.6% less than projected in September 2009. Joint Release, U.S. Census Bureau & U.S. Dep't of Hous. & Urban Dev., New Residential Construction in October 2009 (Nov. 18, 2009) (on file with author), available at [http://www.census.gov/const/newresconst\\_200910.pdf](http://www.census.gov/const/newresconst_200910.pdf). The stock market remains volatile and the value of the dollar is decreasing, meaning foreign-made products will be more expensive for American consumers. Javier C. Hernandez, *As Confident Investors Race to Stocks, the Dollar Weakens Further*, N.Y. TIMES, Nov. 10, 2009, at B1 (commenting that although the weakening of the dollar means more expensive foreign products, it may also render American exports more competitive). This persisting economic uncertainty amplifies the already persuasive policy considerations supporting the denial of the City of Cleveland's public nuisance claim in *Ameriquet*. See *supra* note 114.